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15 Midland Credit Management, Inc.

16 UNITED STATES DISTRICT COURT

17 EASTERN DISTRICT OF WASHINGTON AT SPOKANE

18 EVA LAUBER, DANE SCOTT,
19 SCOTT BOOLEN, JOEL FINCH and
20 all other similarly situated,

21 Plaintiffs,

22 v.

23 ENCORE CAPITOL GROUP INC;
24 MIDLAND FUNDING, LLC;
25 MIDLAND CREDIT
26 MANAGEMENT, INC.; SUTTELL &
HAMMER, P.S.; MARK T. CASE and
JANE DOE CASE, husband and wife;
MALISA L. GURULE, and JOHN

Case No. CV-09-251-EFS
(CONSOLIDATED CASE)

MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS OF
DEFENDANTS ENCORE
CAPITAL GROUP INC.,
MIDLAND FUNDING LLC,
AND MIDLAND CREDIT
MANAGEMENT, INC.

F.R.C.P. 12(b)(6)

1 DOE GURULE; KAREN HAMMER and
2 ISAAC HAMMER, wife and
3 husband; WILLIAM SUTTELL and
4 JANE DOE SUTTELL, husband and
5 wife;

6 Defendants.

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8 **I. INTRODUCTION**

9 By this motion, Defendants Encore Capital Group, Midland Funding LLC
10 (“Midland Funding”), and Midland Capital Management, Inc. respectfully request that
11 the Court dismiss Plaintiffs’ claim for relief under the Washington Consumer
12 Protection Act (“WCPA”). Unlike Plaintiffs’ Fair Debt Collection Act (“FDCPA”)
13 claim, Plaintiffs’ WCPA claim is not based on the alleged filing of false affidavits in
14 debt collection lawsuits. Instead, Plaintiffs assert that they are entitled to treble
15 damages (as well as injunctive and declaratory relief) pursuant to the WCPA because
16 Defendants allegedly violated Washington debt collection laws by failing to comply
17 with licensing and registration requirements, failing to give certain statutorily-required
18 notices, and collecting amounts greater than those allowed by law.
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1 Only Plaintiffs who can plead and prove a cognizable “injury to business or
2 property” may bring a WCPA claim.¹ Plaintiffs have not done so here: the only
3 injury identified in the complaint is that one of the four named plaintiffs – Eva Lauber
4 – purportedly incurred certain minor costs, such as “car mileage” and “used vacation
5 time,” when she defended the debt collection lawsuit that Midland Funding filed
6 against her. This is not sufficient. Washington courts have consistently held that
7 where, as here, a plaintiff asserts a WCPA claim based on a defendant’s debt
8 collection activities, the costs of defending a routine collection lawsuit do not amount
9 to a compensable “injury to business or property” under the WCPA.² Accordingly,
10 Plaintiffs have failed to plead a necessary element of a WCPA claim, and their WCPA
11 claim must be dismissed.
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16 **II. FACTS ALLEGED IN THE COMPLAINT**

17 The Plaintiffs in this case failed to pay their debts and were sued by Midland in
18 Washington state court. Although Plaintiffs do not deny that they owed – and
19 defaulted on – the debts in question, they contend that Midland violated the FDCPA
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22 ¹ RCW 19.86.090 (“Any person who is injured in his or her business or property” by
23 a violation of the WCPA may bring an action in superior court); *Hangman Ridge*
24 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 719 P.2d 531, 534
(1986) (a private WCPA claim “requires a showing that plaintiff was injured in his or
25 her ‘business or property.’”).

26 ² See, e.g., *Sign-O-Lite Signs, Inc.*, 64 Wash. App. 553, 825 P.2d 714, 720 (1992);
Demopolis v. Galvin, 57 Wash. App. 47, 786 P.2d 804, 809 (1990).

1 by filing affidavits with the court in which the affiant had no personal knowledge of
2 the facts and records relating to the Plaintiffs' debts. *See* Complaint ("Cplt."), ¶¶ 7.1-
3 10.74.
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5 In addition to their FDCPA claim, Plaintiffs also attempt to plead a violation of
6 the WCPA. Cplt., ¶¶ 13.1-13.31. The WCPA claim has nothing to do with the
7 allegedly misleading affidavits. Instead, Plaintiffs allege that Midland violated the
8 Washington Collection Agency Act ("WCAA"), and that these violations amount to a
9 *per se* violation of the WCPA. Specifically, Plaintiffs allege that Midland (1) failed to
10 obtain proper licenses; (2) filed lawsuits without being a valid Washington
11 corporation or qualified foreign corporation; (3) failed to give certain statutorily-
12 required notices in debt-collection communications; and (4) misrepresented amounts
13 due and attempted to collect amounts in excess of those allowed by law. Cplt., ¶¶
14 12.1-12.12.
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18 Three of the four named Plaintiffs claim no injury arising from these alleged
19 violations. The only Plaintiff who even attempts to claim damages is Eva Lauber.
20 Specifically, the complaint alleges:
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24 Plaintiff Eva Lauber suffered an injury to property as a result of the
25 Defendants' collection efforts, including but not limited to, mileage to
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1 court to file pleadings, attend the January 15, 2010 and August 18,
2 2010 hearings, used vacation time for time off work to attend
3 hearings, postage, and cell phone time.
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6 Cplt., ¶ 13.2.

7 Pursuant to the WCPA, Plaintiffs demand treble damages, as well as declaratory
8 and injunctive relief. *Id.*, ¶¶ 15.6, 15.7, 15.9.
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11 **III. PLAINTIFFS' WCPA CLAIM MUST BE DISMISSED BECAUSE**
12 **PLAINTIFFS HAVE FAILED TO PLEAD AN INJURY TO BUSINESS**
13 **OR PROPERTY**

14 **A. Legal Standard**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
16 legal sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
17 2001). The motion must be granted if “when construed in the light most favorable to
18 plaintiff, [the complaint] fails to plead sufficiently all required elements of a cause of
19 action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal.
20 1998). Moreover, “a formulaic recitation of the elements of a cause of action will not
21 do.” *Ashcroft v. Iqbal*, -- U.S. --, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp.*
22 *v. Twombly*, 550 U.S. 544, 555 (2007)). Although “detailed factual allegations” are
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1 not required, the rules “demand more than an unadorned the-defendant-unlawfully-
 2 harmed-me’ accusation.” *Id.*

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 5 **B. Plaintiffs’ Claim That She Was Injured By Having To Defend A**
 6 **Routine Collection Action Is Not A Cognizable Injury To Business**
 7 **Or Property**

8 Plaintiffs’ WCPA claim must be dismissed because an injury to “business or
 9 property” is a required element of a WCPA claim, and Plaintiffs have failed to allege
 10 one. A private WCPA claim “requires a showing that plaintiff was injured in his or
 11 her ‘business or property.’” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*
 12 *Co.*, 105 Wash. 2d 778, 719 P.2d 531, 534 (1986); *see also Steele v. Extendicare*
 13 *Health Services, Inc.*, 607 F. Supp. 2d 1226, 1231 (W.D. Wash. 2009) (“a plaintiff
 14 must prove, as an independent element of a CPA claim, ‘injury to plaintiff in his or
 15 business or property.’”) (quoting *Hangman Ridge*, 719 P.2d at 535); *see also* RCW
 16 19.86.090 (“Any person who is injured in his or her business or property” by a
 17 violation of the WCPA may bring an action in superior court.).

18
 19 As the Washington Supreme Court recently explained: “The legislature’s use
 20 of the phrase ‘business or property’ in the [W]CPA is restrictive of other categories of
 21 injury and is used in the ordinary sense to denote a commercial venture or enterprise.”
 22 *Ambach v. French, M.D.*, 167 Wash. 2d 167, 172, 216 P.3d 405 (2009). Damage to
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1 business reputation or losses from being unable to attend to a business establishment,
2 for example, fall into this category. *Id.* at 173. Personal injuries do not. *Id.*

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4 In cases – like this one – where the WCPA claim is based on debt collection
5 activities, Washington courts have consistently held that costs incurred in having to
6 defend a routine collection action are not injury to business or property. *See Sign-O-*
7 *Lite Signs, Inc.*, 64 Wash. App. 553, 825 P.2d 714, 720 (1992) (reversing award of
8 treble damages under WCPA, where Plaintiff claimed injury based on incurring
9 attorneys’ fees for defending collection action, and holding that Plaintiff’s “mere
10 involvement in having to defend against Sign’s collection action and having to
11 prosecute a CPA counterclaim is insufficient to show injury to her business or
12 property”); *Demopolis v. Galvin*, 57 Wash. App. 47, 786 P.2d 804, 809 (1990)
13 (“Demopolis’ CPA claims are based upon his alleged injury resulting from having had
14 to bring suit to protect against Lenders’ foreclosure action. This alleged injury is
15 insufficient to satisfy the injury element of a private CPA claim.”); *Steele*, 607 F.
16 Supp. 2d at 1231 (noting that “having to defend against a collection action and
17 prosecute a CPA claim is not sufficient injury” to establish a WCPA claim) (quoting
18 *Sign-O-Lite*, 64 Wash. App. at 564).

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20 Here, the only Plaintiff who has pled any injury whatsoever as a result of
21 Midland’s alleged WCPA violation is Eva Lauber, and her purported “injury” consists
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1 solely of minor costs incurred defending the collection lawsuit Midland filed against
2 her, such as mileage, used vacation time, postage, and cell phone time. Cplt., ¶ 13.2.
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4 These are precisely the type of costs associated with defending a routine collection
5 action that are not compensable under the WCPA. *See Sign-O-Lite*, 64 Wash. App.
6 564; *Demopolis v. Galvin*, 57 Wash. App. 47. Indeed, as the Court noted in *Sign-O-*
7 *Lite*, “to hold otherwise would be to invite defendants in most, if not all, routine
8 collection actions to allege CPA violations as counterclaims.” *Sign-O-Lite*, 64 Wash.
9 App. 564. Accordingly, Plaintiffs’ WCPA claim must be dismissed, along with their
10 demands for treble damages under the WCPA, and their demands for declaratory and
11 injunctive relief.³
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22 ³ Declaratory and injunctive relief are not available on Plaintiffs’ remaining FDCPA
23 and WCAA claims. *See Durham v. Continental Credit, et. al.*, 2010 WL 2776088, *8
24 (S.D. Cal. 2010) (“The courts that have specifically addressed whether [injunctive and
25 declaratory] relief is available to private plaintiffs in FDCPA actions uniformly hold
26 that the FDCPA does not authorize such relief.”); *Connelly v. Puget Sound*
Collections, Inc., 16 Wash. App. 62, 553 P.2d 1354 (1976) (only the Attorney General
can bring an action to restrain a violation of the WCAA).

1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court
3 dismiss Plaintiffs' WCPA claim.
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5 DATED this 24th day of January, 2011.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CERTIFICATE OF SERVICE

I, Ashley Woods, the undersigned, hereby certify that on January 24, 2011, I electronically filed the foregoing Memorandum with the Court using the Court's CM/ECF system, which will send notification of such filing to the following persons:

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Dated this 24th day of January, 2011.



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